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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 415

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, ET AL.,

Appellants,

vs.

J. M. WITSELL, EDWARD M. BURROUGHS, E. L. SWEAT, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM

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BRIEF FOR APPELLEES

Supreme Court of the United States

OCTOBER TERM, 1947

No. 415

EARLE J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, *ET AL.*, APPELLANTS

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, *ET AL., ETC.*, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT

The appellants, five Georgia commercial fishermen and a Florida corporation which functions as an association of fishermen, brought this action in the District Court of South Carolina to enjoin the enforcement of certain portions of South Carolina's "Coastal Fisheries Law", contained in Sections 3299-3414 of the Code of South Carolina. The pertinent statutes are set out in an appendix to this brief.

Challenged are Section 3300 which declares that South Carolina waters, including that portion of the ocean with-

in three miles of low water mark are "a common for the people of the State for the taking of fish"; Section 3374, which imposes a tax of one-eighth cent per pound on green shrimp taken in South Carolina waters; Section 3414, which requires shrimpers in South Carolina waters to unload their catch in the state "and pack and properly stamp the same before shipping or transporting it to another state"; and Section 3379, which requires the licensing of all shrimp boats used in South Carolina waters.

Of these Code sections, only the last is of recent origin, the others having been in force for ten years or more. After a Joint Resolution of the General Assembly of South Carolina (44 Stat. 543) had, in 1945, created a Committee "to study coastal fishery laws", Section 3379 was amended by a 1947 Act (45 Stat. 576) to change the license fees charged for shrimp boats to $25.00 if owned by residents of South Carolina, $150.00 if owned by non-residents who had operated boats in South Carolina for the past three years, and $2,500.00 if owned by other non-residents. The maximum number of non-resident licenses was fixed at one hundred.

Each of the appellant fishermen fished in South Carolina waters in disregard of the law during the 1947 season (R. 3, 5, 25-27, 29, 32, 35); all have criminal records in South Carolina for out-of-season fishing and other violations of the Fisheries Law. (R. 25-27, 29.)

DECISION BELOW

When appellants' application for an interlocutory injunction was heard by the three-Judge District Court, convened pursuant to Section 266 of the Judicial Code, the case was submitted for a final decree. The Court, in its decree of 12 September, 1947, dismissed the suit and de-

nied the application for an injunction. The Court considered the constitutional questions on their merits and held that the South Carolina statutes were valid (R. 49, 73 Fed. Supp. 371).

This Court noted probable jurisdiction on 24 November, 1947.

SUMMARY OF ARGUMENT

South Carolina has the right to control and conserve the fish within its territorial limits, including the three-mile maritime belt, for the benefit of its own citizens. Such wild life is owned by the citizens of South Carolina, their ownership and right to take being subject only to the exercise of the State's police power and to any regulation of the Federal Government acting within its broad constitutional powers.

If that is true, and there is no deviation from the long line of authorities so holding, there is no merit in any of appellants' contentions. There is no violation of the Privileges and Immunities Clause since the inhabitants of one state do not have the "privilege" of sharing in property owned by the inhabitants of another. There is no violation of the Equal Protection or Due Process clauses of the Fourteenth Amendment since the State has the right to exclude citizens and residents of Georgia from its wild life resources. There is no tax on imports into South Carolina since the shrimp are taken from South Carolina's own waters. There is no burden upon interstate commerce since South Carolina has the right to condition the taking of its fish before interstate commerce commences.

The Court below correctly decided the constitutional issues in accordance with the established authorities, but it was unnecessary to do so. It could have denied the ap-

pellants the equitable jurisdiction of a Federal Court because they did not show irreparable damage justifying the enjoining of a State criminal law, and because they came into Court without clean hands.

ARGUMENT

I

THE SOUTH CAROLINA FISHERIES LAW IS CONSTITUTIONAL

Appellants' contention is that the State of South Carolina is without power to regulate fishing in its waters within the marginal three-mile belt below low water mark so as to establish different conditions for the fishing of those waters by residents and non-residents. Upon this basis they attack several of the South Carolina statutes pertaining to shrimping, but in the final analysis the attack is against the provision of Section 3300 that the waters of the state, including those within the three-mile limit, "shall continue and remain as a common for the people of the State for the taking of fish". If South Carolina can constitutionally maintain the fisheries within its waters as a common fishing ground for its people alone, all of appellants' constitutional arguments are answered.

Upon this issue it has been uniformly held that a State has the right to control its fisheries and other wild life for the benefit of its own citizens and may, in the exercise of that power, exclude others absolutely from the taking of

the wildlife or attach whatever conditions to the taking that it desires.[1]

The rule announced by these Federal decisions has been accepted by State Courts,[2] and by the authors of texts and encyclopedias.[3]

The announcement of the rule by this Court has been unequivocal:

> "These [the fisheries] remain under the exclusive control of the State, which has consequently the right in its discretion to appropriate its tidewaters, and their beds to be used by its People as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property.
>
> *McCready v. Virginia*, 94 U. S. 391, 395.

> "[The riparian states] can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, pearls, or amber, or other products of the sea."
>
> *Louisiana v. Mississippi*, 202 U. S. 1, 52.

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[1] *Geer v. Connecticut*, 161 U. S. 519; *Smith v. Maryland*, 18 How. 71; *McCready v. Virginia*, 94 U. S. 391; *Manchester v. Massachusetts*, 139 U. S. 240; *Lawton v. Steele*, 152 U. S. 133; *Ward v. Race Horse*, 163 U. S. 504; *Louisiana v. Mississippi*, 202 U. S. 1; *Lee v. New Jersey*, 207 U. S. 67; *People ex rel. Silz v. Hesterberg*, 211 U. S. 31; *Patsone v. Pennsylvania*, 232 U. S. 138; *The Abby Dodge*, 223 U. S. 166; *New York ex rel Kennedy v. Becker*, 241 U. S. 556; *Corey v. South Dakota*, 250 U. S. 118; *Hauoli v. Alaska Packers Association*, 263 U. S. 510; *LaCoste v. Department of Conservation*, 263 U. S. 545; *Republic Fish Flour Co. v. Gentry*, 267 U. S. 422; *Skiriotes v. Florida*, 313 U. S. 69; *Corfield v. Coryell*, Fed. Cas. No. 3230, 4 Wash. C. C. 371; *Anderson v. Smith*, 9 Cir. 71 Fed. (2d) 498; *Markovich v. Milner*, 34 Fed. Supp. 689.

[2] For example, *Commonwealth v. Hilton*, 174 Mass. 29, 54 N. E. 362; *State v. Gulley*, 128 N. C. 570, 38 S. E. 169; *Cummings v. People*, 211 Ill. 302, 71 N. E. 1021; *State v. Ashman*, 128 Tenn. 664, 135 S. W. 326; *State v. Robinson*, 25 R. I. 211, 55 Atl. 632; *People v. Schuyler*, 161 Mich. 64, 126 N. W. 644; *State v. Catholic*, 75 Ore. 267, 147 Pac. 372.

[3] 22 Am. Jur. 666, Section 2; 22 Am. Jur. 692, Sec. 36; 24 Am. Jur. 386; 15 C. J. S. 313, 61 A. L. R. 332.

"It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for its own citizens if it pleases."

Patsone v. Pennsylvania, 232 U. S. 138, 145.

"It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State * * *, subject, of course, to any valid exercise of authority under the provisions of the Federal Constitution."

New York ex rel Kennedy v. Becker, 241 U. S. 556, 562.

"The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power, the State may regulate and control the taking, subsequent use, and property rights that may be acquired therein."

LaCoste v. Department of Conservation, 263 U. S. 545, 549.

"Over these fish, and over state wild game generally, the state has supreme control."

Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 426.

The State's exercise of this right to preserve the fish for its own residents violates neither the Privileges and Immunities Clause, nor the Fourteenth Amendment.

In *McCready v. Virginia*, 94 U. S. 391, a Virginia statute prohibiting citizens of other states from planting oysters in Virginia waters was held valid, the Court saying that the plaintiff was not entitled to the same rights in this respect as Virginia citizens, who had a property right in the fisheries rather than "a mere privilege of immunity of citizenship".

In *Patsone v. Pennsylvania*, 232 U. S. 129, the Court sustained a conviction under a Pennsylvania statute making it a criminal offense for an alien to kill a wild bird or animal and, for the purpose of enforcing the prohibition, making it unlawful for such alien to own or be possessed of a rifle or shotgun.

In *Haavik v. Alaska Packers Assoc.*, 263 U. S. 509, it was held that the Territorial Government of Alaska could validly impose an annual license tax upon non-resident fishermen without violating the Privileges and Immunities Clause of the Constitution. A similar holding as to Alaska fishing licenses was made in *Anderson v. Smith*, 9 Cir., 71 Fed. (2d) 493, where it was said "it is equally well settled that states have a right to exact a higher license fee from non-residents than from residents for the privilege of hunting game within its borders."

> "The privileges and immunities guaranteed to the citizens of the United States by the Fourteenth Amendment do not include a right to share in the heritage of the people of Oregon, by fishing in the McKenzie River or any other stream within that State. Nor may any person fish in any such bodies of water solely by virtue of his citizenship in the United States. The right to take from the fisheries held in common by the citizens of Oregon is acquired only through membership in that body."
>
> *Thompson v. Dana*, 52 Fed. (2d) 759, 762.

The cases are likewise clear that interstate commerce is not unconstitutionally burdened by a State's refusal to allow its wild life to be taken except under stipulated conditions. The fact that appellants would take the shrimp from South Carolina to Georgia if they were allowed to catch them does not give them the right to catch them. "A man cannot acquire a right to property by his desire to

use it in commerce among the states." Mr. Justice Holmes in *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357.

South Carolina does not attempt to regulate the movement of the shrimp after they have been legally taken, packed and the stamp tax paid. The required packing in South Carolina and the payment of one-eighth cent per pound on shrimp taken in South Carolina waters does not unconstitutionally burden interstate commerce because neither the packing nor the stamping discriminates against interstate commerce (R. 57, 73 Fed. Supp. 378). No interstate transportation has commenced. Shrimp consumed in South Carolina and those destined to go to other states are taxed alike.

South Carolina could prohibit the shipment beyond the state of fish or shrimp taken in its waters by forbidding the possession of game for the purpose of transporting it beyond the state, even though interstate commerce might be "remotely affected." *Geer v. Connecticut*, 161 U. S. 519, 530; *People ex rel Silz v. Hesterberg*, 211 U. S. 31, 41; *Carey v. South Dakota*, 250 U. S. 118, 120; *Lacoste v. Department of Conservation*, 263 U. S. 545, 551; *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 426.

Distinguishable from these cases, and distinguished in the *Bayside case*, is *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, where the Court struck down a patent effort to interfere with interstate commerce in the processing and sale of shrimp. *Cf. Van Camp Seafood Co. v. Department of Natural Resources*, 30 Fed. (2d) 111.

Appellants' contention that the Fisheries Law is invalid because its enforcement touches not only shrimp caught in South Carolina waters but those caught outside the three-mile limit is sufficiently answered by the Court be-

low (R. 58, 73 Fed. Supp. 378) upon the authority of the *Bayside Fish Flour Co. case* and the decision of a three-Judge District Court of California in *Mirkovich v. Milnor*, 34 Fed. Supp. 409. Enforcement of this and many other laws would be ineffective if things beyond the State's right of direct control could not be collaterally affected. *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 320.

Appellants' contention that South Carolina cannot legally condition the licensing of a non-resident shrimp boat upon "proof that the owner of the non-resident boat has paid all income taxes due to the State of South Carolina for profits made from operations in South Carolina during the preceding year" is without merit. This requirement in Section 3379 is merely a method of enforcing the payment of the income tax due South Carolina under its general Income Tax Law (Section 2435, *et seq.* of the Code) by non-residents doing business in the state. State taxation of the income of a non-resident from business done within the taxing state is valid. *Shaffer v. Carter*, 252 U. S. 37.

EFFECT OF SHRIMP FISHERIES BEING BEYOND LOW WATER MARK

South Carolina by Section 3300 of its Code has declared its control over the ocean fisheries to extend to "three miles of any point along low water mark." This is the customary extent of a State's claim of sovereignty. The authorities which we have cited affirming the State's plenary right to control its fisheries and other wild life recognize the right as fully within the three-mile maritime belt as they do within the State's interior.

From *Manchester v. Massachusetts*, 139 U. S. 240, 258:

"The limits of the right of a nation to control the fisheries on its seacoast, and in the bays and arms of

the sea within its territory, have never been placed at less than a marine league from the coast on the open sea."

* * * *

"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embeddied in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war, or for the prevention of frauds on their revenue, exercise an authority beyond this limit."

From *Louisiana v. Mississippi*, 202 U. S. 1, 52:

"The maritime belt is that part of the sea which, in contra-distinction to the open sea, is under the sway of the riparian states which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

In *The Abby Dodge*, 223 U. S. 166, 173, the Court construed a Federal statute prohibiting a certain type of sponge fishing in "the waters of the Gulf of Mexico or straits of Florida" as having no application to waters within the maritime belt of the State of Florida, holding that if the statute was construed to apply to fishing within that part of the ocean lying within Florida's territorial waters "the repugnancy of the Act to the Constitution would plainly be established by the decisions of this Court."[4]

[4] Citing *McCready v. Virginia*, 94 U. S. 391; *Manchester v. Massachusetts*, 139 U. S. 240.

Similarly in *Skiriotes v. Florida*, 313 U. S. 69, the Court upheld a Florida statute forbidding the use of diving apparatus for the taking of commercial sponges from the waters of the ocean within the maritime belt as established by Florida.

The acceptance of this view that a State may exercise control over the fisheries within its three-mile maritime belt answers the argument that the statute imposes a tax on imports.

EFFECT OF UNITED STATES V. CALIFORNIA

Unless the reasoning in *United States v. California*, 67 Sup. Ct. 1658, 91 L. Ed. 1414, requires a change in the law as to a State's right to control its fisheries, the cited decisions answer every point raised in the present appeal. As we read the California opinion, the principles of these decisions are not overruled but are distinguished from the principles upon which that decision was rested.

Superficially the argument might be made that since some of the decisions declaring a State's absolute right to control its fisheries refer to the State's "ownership" of its fisheries and other wild life, the holding in the *California case* that the State does not "own" the oil in the earth beneath the maritime belt is conclusive as to the "ownership" of the fisheries in the water. If "ownership" by the State is what is involved here as it was in the *California case*, it could be argued that there is a basic distinction between the ownership of wild life in the ocean within the three-mile limit and the ownership of oil and minerals beneath the earth's surface. Such a distinction is unnecessary because, despite the language of some of the decisions, a State's right to control its wild life does not rest upon the State's actual title to the fish and game.

When the authorities are closely read it appears that historically the ownership of animals *ferae naturae* lies in the people of the state with the State acting in its governmental capacity in directing their conservation for the benefit of all the people rather than in its capacity as a proprietor. The legal interest of each individual citizen in wild life within the borders of his state seems to lie within the property concept of a "negative community".[8] The people of a state own the wild animals therein and have a common right to take them but only under the conditions prescribed by the State, which, as a protector of the interests of all, is endowed with the governmental power of absolute control.

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[8] The historical basis of this concept is found in Mr. Justice White's opinion in *Geer v. Connecticut*, 161 U. S. 519. He traces the idea of public ownership of wild life and the state's right to control it from ancient time down to his day. It was the Roman law that "*animals ferae naturae* * * * having no owner, were considered as belonging in common to all the citizens of the state". (Digest, Book 41, Tit. 1, *De Adquir. Rer. Dom.*). He cites the *Institutes of Justinian* (Book 2, Tit. 1, Sec. 12) to the effect that as to game each citizen is "the owner in common with other citizens." He quotes Pothier, *Traite du Droit de Propriete*, No. 21, as classifying certain property rights as a "negative community of interests" as distinguished from a positive community such as a tenancy in common, and saying "as regards wild animals *ferae naturae*, they have remained in the ancient state of negative community." He quotes the Napoleon Code (Arts. 714, 715): "There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed. The faculty of hunting and fishing is also regulated by special laws." He refers to 1 St. Joseph Concordance 58 as stating that the same idea prevailed in Germany, Austria, and Italy. He makes lengthy quotations from Blackstone (2 Bl. Com. 1, 12, 14, 394, 410) upholding the doctrine of the people's common ownership of game, subject to whatever "royal prerogative" might have been claimed. Mr. Justice White ends his historical analysis by stating that the Government's right to control the exercise of the people's common ownership of wild life was vested in this country in the Colonial governments and "passed to the states with the separation from the mother country, and remains in them at the present day, in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution." (161 U. S. 528.) *Cf.*, upon the theory of the State's "ownership" of animals *ferae naturae*: *Missouri v. Holland*, 252 U. S. 416, 434; 14 Cornell L. Quart. 245; Pound, *An Introduction to the Philosophy of Law*, p. 198; *Borchard, Resources of the Continental Shelf*, 40 Am. J. Int. L. 53.

The people rather than the State hold title to animals *ferae naturae*. In the early case of *Corfield v. Coryell*, Federal Case No. 3230, 4 Wash. C. C. 371, it was said:

> "It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use."

From *Geer v. Connecticut*, 161 U. S. 519, 530:

> "The sole consequence of the provision forbidding the transportation of game killed within the state, beyond the state, is to confine the use of such game to those who own it, the people of the state. The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other states to participate in that which they do not own.
>
> * * * *
>
> "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose."

In *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 209, the Court said that

> "* * * things which are *ferae naturae* belong to the 'negative community;' in other words, are public things to the absolute control of the state, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid, their future taking. *Geer v. Connecticut*, 161 U. S. 519, 525, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600.
>
> * * * *
>
> "In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public

> property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two."

In *McCready v. Virginia*, 94 U. S. 391, 395, the Court said that the appropriation by the State of its tidewaters as a common for taking fish was "nothing more than a regulation of the use by the People of their common property. The right which the People of the state thus acquire comes not from their citizenship alone but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

From *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 11:

> "These and many other cases show that the state owns or has power to control the game and fish within its borders not absolutely or as proprietor for its own use or benefit, but in its sovereign capacity as representative of the people."

The State's right to control the wild life within its borders is the same whether the subject is shrimp in the sea, fish in the rivers, animals in the uplands, or birds in the air. The ownership of the soil on which or over which the animals roam is immaterial so far as the State's rights are concerned. At most, the owner of the land where animals *ferae naturae* are found has a qualified property interest in them by virtue of his right to exclude others from trespassing upon his land to take them.[6] Whatever rights he might thus have against other private claimants to the

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[6] *Cf. Gratz v. McKee*, 8 Cir., 270 F. 713 (Aff. 260 U. S. 127); *State v. Mallory*, 73 Ark. 236, 83 S. W. 955; *Realty Co. v. Johnson*, 92 Minn. 363, 100 N. W. 94; *State v. Horton*, 139 N. C. 588, 51 S. E. 945; Annotation, Ann. Cas. 1917-B, 958.

game are completely subject to the State's paramount right to control the taking of wild life belonging to its people.[7]

The claim of the State of California which this Court denied in *U. S. v. California* was based on title to the land beneath the ocean within the three-mile belt and therefore of the oil beneath. The interest in the oil lands claimed by the State was a fee-simple title capable of being sold and leased with profit to the State. A denial of this claim against the Federal Government, unconnected with any claim of common ownership by the people of the State as against outside private claimants, is far from a denial of the State's right to control for its citizens the fisheries within its jurisdiction.

The decision in the *California case* was "that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the State has paramount rights in and power over the belt, and incident to which is full dominion over the resources of the soil under that water area, including oil." An emphasis as to the narrow nature of the question decided is contained in the decree filed on 27 October, 1947, 92 L. Ed. 72.

The Court in the *California case* was careful to distinguish the authorities upon which we rely upon the ground that they were concerned only with the State's regulatory powers and did not involve the title to the land under the marginal sea. As to *Manchester v. Massachusetts*, the majority said: "That case involved only the power of Massachusetts to regulate fishing". *Louisiana v. Mississippi* "did not involve any dispute between the Federal and State Governments" and the extent of "the sway of the

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[7] Annotations: 56 A. L. R. 295; 89 L. R. A. 584; L. R. A. 1916-E, 523.

riparian states" over the maritime belt, referred to in that opinion, was not defined. "The opinion in [the *Abby Dodge*] was concerned with the State's power to regulate and conserve within its territorial waters, not with its exercise of the right to use and deplete resources which might be of national and international importance."

U. S. v. California refers to *Skiriotes v. Florida* as involving the same type of question and quotes Chief Justice Hughes' opinion:

> "It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the (State) statute **so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting Federal legislation, is within the police power of the State.**"

We do not understand the *California case* as holding that the Federal Government has title to the lands within the three-mile belt, but even Federal ownership would not prohibit the States from controlling the fisheries within the water above those lands so long as the Congress does not enter that field of regulation. *Omaechevarria v. Idaho*, 246 U. S. 343.[8]

The Federal Government has made no effort to regulate shrimping within the three-mile maritime belt. Most of the authorities considering the State's right to control its fisheries within the three-mile ocean belt have in their declaration of such power inserted a saving provision that it is subject to the National Government's paramount right to regulate commerce. Any regulation or use of its resources by South Carolina must necessarily give way to an

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[8] See generally upon the State's exercise of police powers over Federally owned lands: *Colorado v. Toll*, 268 U. S. 228; *International Bridge Co. v. New York*, 254 U. S. 126; *McKelvey v. U. S.*, 260 U. S. 353; *Surplus Trading Co. v. Cook*, 281 U. S. 647; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. v. Commission*, 302 U. S. 186.

incompatible regulation by the Government under one of its constitutional powers. If South Carolina's fishery regulations interfere with the Federal Government's control of commerce within the three-mile belt, or with its defense powers, or its dealings with foreign nations, the national interest would prevail. If some Federal interest attaches to the fisheries themselves, as it did to migratory birds under *Missouri v. Holland;* 252 U. S. 416, the State's right of control is superseded or modified.

There is in the present case no conflict between the State and the Federal Government. Neither Congress nor the Executive[9] has indicated any interest in controlling the fisheries. With the State's plenary powers of control explicit in the decisions of this Court, the Federal Government by silence has acquiesced in that control. It indicated in its contest with California over the oil in the submerged lands off California's shores that it had no intention of dislodging the power of the States to control fisheries. The Government's brief said (page 157): "Whether or not a state owns the fish within the marginal sea, its police power to regulate the means of taking them seems plain, at least in the absence of legislation by Congress". (Citing such cases as *Lawton v. Steele* and *Silz v. Hesterberg, supra*).

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[9] The difference in the attitude of the Executive Branch toward the oil lands beneath the ocean and the fisheries is demonstrated by the terms of two proclamations issued by President Truman on September 28, 1945; one, No. 2667, 10 F. R. 12303, announcing U. S. *jurisdiction and control* over "the natural resources of the sub-soil and sea bed of the continental shelf beneath the high seas, but contiguous to the coast of the United States", and the other, No. 2668, 10 F. R. 12304, dealing with coastal fisheries within the same ocean area, merely contemplating the establishment of "conservation zones". The executive orders complementing these proclamations are similar in purport. No. 9633, 10 F. R. 12305 places under the *jurisdiction and control* of the Secretary of the Interior the natural resources of the sub-soil and sea bed, while No. 9634, 10 F. R. 12305, provides that the Secretary of State and the Secretary of the Interior shall from time to time recommend the establishment of fishery conservation zones and provisions relating to their administration "pursuant to authority of law heretofore or hereafter provided."

II

SOUTH CAROLINA'S PURPOSE IS TO CONSERVE ITS FISH

If the State's right to control the taking of shrimp from its waters and to condition the taking by non-residents exists, the legislative motives in the exercise of that right are immaterial.[10] However, were South Carolina's purposes pertinent, they are legitimate efforts to conserve the State's fisheries for the benefit of South Carolinians.

The present Fisheries Law was largely enacted in 1924 (33 Stat. 1016); its forerunner was a 1906 Act (35 Stat. 85). The changes in the law since 1924 have taken the form of amendments to that statute now embraced in Sections 3299-3414 of the Code. The title of the 1924 Act was "An ACT to Protect and Preserve the Fish and to Encourage the Fishing Industries in the Tide Waters of the State; to Provide for the Regulating Thereof and the Revenue Therefrom, and for Other Purposes."

The original Act and its amendments lead to the conclusion that the State Legislature is vitally concerned with preserving for its citizens, of this and later generations, the resources of its fisheries and particularly those along its coast. Section 10 (Code 3309) authorizes the experimental propagation of shellfish with reports thereon to the General Assembly; Section 14 (Code 3313) requires a detailed record of the quantity and commercial value of each kind of fish taken, exported and consumed within the State, the number of persons engaged in the various branches of the fishing industries, their earnings "and any other matter or thing which to [the Board] may appear

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[10] *Sonzinsky v. U. S.*, 300 U. S. 506; *Fox v. Standard Oil Co.*, 294 U. S. 87; *Fernandez v. Wiener*, 326 U. S. 340; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381.

advisable"; Sections 32 (Code 3332) *et seq.*, provide for the leasing of oyster bottoms under close supervision to insure the proper propagation of oysters; for closed seasons for various fish; for the elimination of fishing methods destructive of the fish supply. In general, the purpose of the Act was to inaugurate and develop a conservation program.

The excerpts from the Annual Reports of the South Carolina Board of Fisheries (R. 37-48) show with what zeal the State officials are attempting to carry out the legislative purpose of conservation and to agree on a joint program with their neighboring states. In 1945 (R. 39-41) the Board reported to the General Assembly its fear that the supply of shrimp in South Carolina waters would not stand the increased trawling foreseen in the post-war years, particularly by non-residents, whose shrimping boats operating in South Carolina waters that year outnumbered those of residents. In 1945 a Joint Resolution of the General Assembly (44 Stat. 543) was passed creating a committee "to study coastal fishery laws." It was probably upon the advice of this Committee, and upon the warnings of the State Board of the impending danger to South Carolina shrimping by excessive trawling, that the 1947 amendment to the Fisheries Law providing for the distinction as to license fees between residents and non-residents was passed.

In the 1947 amendment the Legislature shows its purpose to reduce, though not to eliminate, the depletion of its shrimp supply by non-resident commercial fishermen. The method selected was a licensing system. The enforcement of the Fisheries Law is vastly more difficult in the case of non-resident fishermen than of residents, since the resident fishermen will normally bring their boats and their

catches into a South Carolina port while non-resident fishermen must be caught on the high seas by South Carolina Inspectors in order to make enforcement effective. It is therefore appropriate to require these non-resident licensees to pay more for their licenses than the residents pay. The 1946 report of the Fisheries Board (R. 48) describes the increased complexity of enforcing the shrimping law. It is even necessary to employ airplanes.

A revenue-raising measure made a part of a regulatory statute for the purpose of financing the regulatory features of the Act does not invalidate the Act even though interstate commerce is directly burdened by the tax. It is upon this theory that inspection fees are allowed if they bear any reasonable relation to the cost of enforcing the inspection or other regulation. *Texas Co. v. Brown*, 258 U. S. 466; *Phipps v. Cleveland Refining Co.*, 261 U. S. 449; *Standard Stock Food Co. v. Wright*, 225 U. S. 540; *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160; *Jewel Tea Co. v. Troy*, 80 Fed. (2d) 366. Cf. *Foote & Co. v. Stanley*, 232 U. S. 494.

There is no showing that the costs of enforcement of the South Carolina Fisheries Law as to non-resident fishermen are less than the license fees to be charged them. The annual reports of the State Board of Fisheries for the past five years (R. 48) show that the Board's revenues have never equaled its enforcement expenses.

Aside from the higher cost of enforcing the Fisheries Law in the case of non-residents, the South Carolina Legislature can be assumed to have acted upon the premise that a peculiar danger to the shrimp supply in South Carolina existed in the operations of non-resident commercial fishermen. The size of their boats, frequency of their visits to South Carolina waters, and the particular fishing meth-

ods, legal and illegal, which they use are all valid considerations for the Legislature. (R. 25-27, 29, 32-3, 36, 40, App. Br. 52.)

South Carolina showed that its purpose in the 1947 Act was one of conservation by limiting the number of out-of-State shrimping boats operating each season in South Carolina waters. In these one hundred licenses the statute directs that preference be given to non-residents who have fished in South Carolina for the longest number of years, such persons being of the class required to pay only a license fee of One Hundred and Fifty Dollars. It is obvious that had South Carolina been desirous of passing a revenue measure it would have given preference to the Twenty-five Hundred Dollar applicants.

Non-resident fishermen who in the past have operated in South Carolina waters and taken shrimp belonging exclusively to the citizens of the State purely at the sufferance of South Carolina have no grounds of complaint when the State "as a proper conservation measure" requires of them "a license fee so high as to limit their number and to reimburse the people of the State in some measure for the loss sustained by them from the fishing of those who are licensed." (R. 57.)

III

APPELLANTS SHOW NO IRREPARABLE INJURY

Appellants have shown no irreparable damage sufficient to justify a Federal Court of Equity enjoining the enforcement of State criminal laws. Appellants' original petition alleged that their boats were in danger of confiscation if they were operated in South Carolina waters in violation of the Fisheries Law (R. 5, 6). They now agree (R. 29) that no confiscation of appellants' boats or equip-

ment will take place. Appellants' claim of "irreparable damage" is that as a class they will be subjected to a multiplicity of criminal proceedings and that their private businesses will be disrupted to their financial loss. Such a showing is not sufficient to justify injunctive relief. *American Federation of Labor v. Watson*, 327 U. S. 582; *Spielman Motor Sales Corp. v. Dodge*, 295 U. S. 89; *Beal v. Missouri-Pacific R. Corp.*, 312 U. S. 45; *Douglas v. Jeanette*, 319 U. S. 157.

The applicable principles are well stated by the late Chief Justice in his dissent in *American Federation of Labor v. Watson*:

> "A criminal prosecution or other litigation conducted in state courts by a state official, within the scope of his authority as such, may, it is true, cause apprehension on the part of those who are alleged to be law-breakers. Such apprehensions and those of others may lead to changes in business practices to the injury of the alleged lawbreakers. But the conduct of such proceedings, in good faith and in conformity to law, is not actionable at law or in equity. Damage or loss to one's business or pocketbook, resulting from such proceedings, is but an incident to the necessary performance of a public function of state government. It is *damnum absque injuria*." (Citing cases.)
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> "It is not enough to show that the injury to appellants is only that which is a normal incident of the state's assertion of its authority to enforce its laws. No person is immune from any good faith prosecution by the state for his unlawful acts. Neither the imminence of the prosecution nor the incidental injury which may flow from it is a ground for equity relief, since the constitutionality of the statute may be ascertained by the proceeding in the state courts with appellate review by this Court, as readily as by a suit in the federal courts." (Citing cases.)
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> * * * *

"Hence the arrest by federal courts of the processes of the civil or criminal law of the state, and the determination of questions of civil or criminal liability under state law, must be predicated not only upon a showing of unlawful or unconstitutional action on the part of the state, but upon some showing of a resulting immediate and irreparable injury which can be avoided or prevented only by the federal court's transferring the trial of the state questions from the state courts to itself. *Douglas v. Jeannette, supra* (319 U. S. 164, 87 L. Ed. 1329, 63 S. Ct. 877, 882)."

Ten of the twelve boats owned by the plaintiff Toomer have been fishing in South Carolina waters throughout the 1947 season by the simple expedient of having them transferred to a South Carolina corporation of which he is president (Stipulation No. 6, R. 29). Are non-resident plaintiffs irreparably damaged by high license fees when they can obtain the advantages of lower priced resident licenses by transferring their boats to South Carolina corporations which can be formed at nominal expense?

The conduct of these appellants in making a practice of violating the South Carolina Fisheries Law has been such that equitable relief should be denied. Their petition admits (R. 3, 5) that they made no attempt to obey the law during the 1947 fishing season, have fished in South Carolina waters in disregard of the law, as a result of which warrants for such violations have been issued against them, which warrants they have avoided.

The evidence discloses (R. 25-7, 29, 32-3, 36) that as to provisions of the South Carolina Law connected and unconnected with the portions now challenged, plaintiffs are habitual lawbreakers. Twice during 1947 DeGracia has pled guilty in the South Carolina Courts to shrimping out of season. Collins and Davies pled guilty in the Beaufort General Sessions Court to the same offense on June 3, 1947.

The same Court issued a Bench Warrant for the arrest of Cesaroni for a similar offense on June 3, 1947, and Cesaroni was convicted of other such offenses in 1940 and 1943, and three times in 1945. Toomer was charged with violating the statute against fishing out of season on November 14, 1938, forfeiting his appearance bond, and was convicted of violating the fisheries laws on August 28, 1945. Thus three of the individual plaintiffs have pled guilty to out-of-season shrimping in South Carolina waters this year, and the other two have records of similar offenses in prior years. This flagrant disregard of South Carolina's Fisheries Law shows that these plaintiffs are not entitled to equitable relief and demonstrates that South Carolina has ample reason to make a particular classification of non-resident fishing operations.

Another consideration in view of the requirement that appellants' "irreparable injury" must be "imminent", is that the only provision of South Carolina law that is new is the amendment to Sec. 3379 of the Code increasing the scale of license fees for shrimping. Sec. 3414, requiring fishermen to bring their catch into a South Carolina port, has been in effect since 1936. Most of the other provisions of the Fisheries Law go back to 1924 and 1925. The appellants have either obeyed the law in past years without any great injury, or violated it with impunity.

CONCLUSION

The Court below properly followed the established principle that a State has the right to control the fisheries within its jurisdiction and to establish different conditions for the fishing of its waters by residents and non-residents.

Respectfully submitted,

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PERTINENT SOUTH CAROLINA CODE SECTIONS

Section 3300

Jurisdiction.—The waters and bottoms of the bays, rivers, creeks and marshes within the State or within three miles of any point along low water mark on the coast thereof, not heretofore conveyed by grant from the Legislature or lawful compact with the State, shall continue and remain as a common for the people of the State for the taking of fish, subject to the provisions of §§ 3299 thru 3412 and any future act that may be passed: *provided,* the provisions of §§ 3299 thru 3412 shall not apply to fish or fishing in the fresh waters of this State.

Section 3301

Jurisdiction of state board of fisheries.—The state board of fisheries shall have and retain jurisdiction over all salt water fish, fishing and fisheries, and all fishing, fish and fisheries in all tidal waters of the State and all fish, fishing and fisheries in all waters of the State whereupon a tax or license is levied for reason of commercial purposes. This includes the following: all shellfish, crustaceans, diamond back, terrapin, sea turtles, porpoises, shad, sturgeon, rock, herring, and all other migratory fish.

Section 3308

Board to enforce laws.—It shall be the duty of the board of fisheries to impartially enforce all laws pertaining to fish and fisheries.

Section 3313

Records of board.—The records and documents in the office of the board shall include a record of leases granted for bottoms for the propagation of shellfish and the subsequent changes of ownership, the particulars and amounts of all licenses and permits of every kind issued; a tabulated

record of the quantity of each kind of fish taken in the waters of the State and the commercial value thereof, the amount exported and the amount consumed within the State; the number of men engaged in the various branches of the fishing industries and their approximate earnings and any other matter or thing which to them may appear advisable; all of which records shall be at all times open for inspection by the Governor or Comptroller General and their accredited agents.

Section 3315

Collection of Revenues—prosecution of violations—employment of special prosecutors.—It shall be the duty of the board to enforce all laws for collection of revenues due the State from the fishing industries and leases of bottoms; and they shall require the inspectors to report to them from time to time all violations coming within their knowledge and the board is authorized to prosecute for violations of said laws when in their judgment such prosecutions are for the best interests of industries or of the State and to that end employ counsel having special knowledge of the fisheries laws and of the matters pertaining to fisheries and coastal conditions to work up and conduct such prosecutions in the inferior courts and to assist the solocitor in the court of general sessions and Supreme Court should he desire such assistance.

Section 3374

Scale of fisheries' tax.—The following fisheries' tax is hereby imposed upon all fish or fisheries products taken or canned, shucked or shipped for market, to-wit: on each sixty ounces of canned oysters two cents; on every gallon of shucked oysters five cents; on every bushel of clams in the shell ten cents; on each bushel of oysters in the shell ten cents; on each terrapin (during the open season) five cents; on soft crabs, two cents per dozen; hard crabs, ten cents per bushel; on crab meat, two cents per gallon, shrimp, when cooked, one cent for each sixty ounces or fraction thereof; on each pound of green shrimp, one-eighth of one cent. *Provided*, that an impose tax of five (5) cents shall

be put upon each white shad and two (2) cents upon each hickory shad offered for sale, or shipped from any point in the state to any point within or without the state: *Provided,* that the license tax on raw oysters shall be five cents per gallon whether sold to local consumers or otherwise, and where said oysters are sold in less than gallon lots; a tax stamp shall be affixed at the rate of five cents per gallon. *Provided,* that a like tax on all shad imported into the State shall be subject to the same tax as herein provided before the same may be offered for sale. *Provided, further,* that there is hereby imposed a tax of two (2¢) cents on each sixty ounces of canned clams and five (5¢) cents per gallon on raw shucked clams.

Section 3408

Closed season on shrimp—commercial fisheries license —terrapin farms.—There shall be a closed season on shrimp or prawn, beginning on the 1st day of March and ending on the 30th day of June each calendar year. Any person, firm or corporation violating said closed season shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than $100.00 nor more than $300.00 or by imprisonment of not less than thirty days nor more than ninety (90) days or both fine and imprisonment, in the discretion of the court. In addition to such punishment all boats, rigging, and equipment used in any violation of said closed season shall be seized and forfeited under the provisions of section 3403, 1932 Code.

The closed season hereby created and declared shall not apply to cast nets, or shrimp caught in same, for personal use.

There shall be license to run terrapin farms, which license shall be $25.00 each calendar year. Such license to be obtained as heretofore provided for.

No commercial fishery of any nature not provided for in the Coastal Fisheries Law shall commence operations unless first obtaining a license to do so from the board of fisheries and said license unless otherwise provided for shall cost $1.00 per annum, and be obtained as heretofore

provided for. There shall be a license to buy and ship clams, such license shall be obtained as heretofore provided for and shall be $5.00 per annum, good only for the open season for clam.

Section 3410

Trawling for shrimp.—The trawling for shrimp in any stream, bay, sound or river within this State is hereby prohibited. *Provided,* that during the existence of the present war in which the United States of America is engaged and for six months following thereafter the trawling for shrimp shall be permitted in any sound in Beaufort County.

Any person, firm or corporation violating the terms of this section, upon conviction, shall be fined not more than one hundred ($100.00) Dollars or imprisoned not more than thirty days.

Section 3414

Licensed shrimp trawlers unload and pack and stamp shrimp before shipping or transporting shrimp out of State.—All boats licensed by this State to trawl for shrimp in the waters of the State of South Carolina shall land or dock at some point in South Carolina, and shall unload their catch of shrimp, and pack and properly stamp the same before shipping or transporting it to another State or the waters thereof. Any person, firm or corporation violating the provisions of this section shall upon conviction thereof be fined not exceeding five hundred ($500.00) Dollars or imprisoned not exceeding one year, or both in the discretion of the court.

This section shall be a part of the coastal fisheries law, and any equipment or property used in the violation of any of the provisions of this section shall be confiscated, as provided for in section 3404, 1932 Code.

Act No. 281 of 1947 Acts (44 Stat. 576).

SECTION 1: § 3379, 1942 Code, amended—shrimp boat licenses—schedule.—That Section 3379, Code of Laws of South Carolina, 1942, be and the same is hereby, amended by inserting after the words "South Carolina" on line 3

thereof the following: "and the below listed licenses are hereby levied annually upon shrimp boats owned by non-residents of this State and shrimp boats owned by residents of this State"; and by adding at the end of said Section the following: All owners of shrimp boats who are residents of the State of South Carolina, shall take out a license for each boat owned by him, and said license shall be Twenty-five ($25.00) Dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina, and who have had one or more boats licensed in South Carolina during each of the past three years shall take out a license for each boat owned by him and said license shall be One hundred and fifty ($150.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina and who have not had one or more boats licensed during each of the past three years shall take out a license for each boat owned by him and said license shall be Two Thousand five hundred ($2,500.00) dollars per year", so that said Section when so amended shall read as follows:

Section 3379. The following license tax is hereby levied annually upon the different fishing appliances except sturgeon nets, used in the waters of South Carolina and the below listed licenses are hereby levied annually upon shrimp boats owned by non-residents of this State and shrimp boats owned by residents of this State: anchor gill nets, stake gill nets and drift gill nets, twenty-five (25¢) cents for each one hundred (100) yards or fraction thereof. Trap nets, floating, one dollar and fifty ($1.50) cents each. Submerged trap nets, three ($3.00) dollars each. Shrimp trawl nets five ($5.00) dollars each. For any apparatus used and not above enumerated other than cast nets and hook and line, the license shall be the same as that provided for the apparatus or appliance which it most resembles. All owners of shrimp boats, who are residents of the State of South Carolina shall take out a license for each boat owned by him, and said license shall be Twenty-five ($25.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina, and who have had one or more boats licensed in South

Carolina during each of the past three years, shall take out a license for each boat owned by him and said license shall be One Hundred and fifty ($150.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina and who have not had one or more boats licensed during each of the past three years, shall take out a license for each boat owned by him and said license shall be Two Thousand five hundred ($2,500.00) dollars per year."

SECTION 2: Nonresident licenses—number limited.—That the State Board of Fisheries shall not grant non-resident licenses to operators of shrimp boats on and after July 1, 1947, in excess of one hundred (100) per year. That in granting licenses to non-resident shrimp boats, the State Board of Fisheries is to give preference to issuance of licenses to those non-resident boats that have been fishing in South Carolina for the longest number of years; *Provided, however,* That application for licenses by such boats, or the operators of such boats be made on or before June 1st of the respective year. If, by June 1st of a respective year, the Board of Fisheries has not granted one hundred (100) licenses to the operators of non-resident shrimp boats, which have operated in South Carolina for the longest number of years, then the Board of Fisheries may grant such licenses to any applicant thereafter until the number of one hundred (100) licenses have been issued.

SECTION 3: Nonresidents pay state income taxes before being licensed.—The Board of Fisheries, before issuing any non-resident licenses in the year 1948 and thereafter, shall require proof that the owner of the non-resident boat has paid all income taxes due to the State of South Carolina for profits made from operations in South Carolina during the preceding year.

SECTION 4: Revoke Licenses.—It is mandatory upon the State Board of Fisheries to revoke immediately, and have its designated Inspector take up, any license issued to a resident or non-resident operator of a shrimp boat upon conviction of any violation of any of the fishing laws,

to-wit: First offense, ten days; second offense, thirty days; third offense, one year.

SECTION 5: Disposition of fines and forfeitures from coastal fisheries laws—issuance of licenses to nonresidents.—All fines and forfeitures for the violation of any of the Coastal Fisheries Laws shall be paid to the Treasurer of the County in which the violation occurs, if, and only if, the case of violation of said Fisheries Laws is brought by an officer of the State or County other than an inspector for the Board of Fisheries. Provided that no license shall be granted to residents of a state if under the laws of that state licenses to trawl for shrimp in that state at the same or less license fee are not granted to South Carolinians applying therefor.

SECTION 6: Repeal.—All Acts or parts of Acts inconsistent herewith are hereby repealed.

SECTION 7: Time effective.—This Act shall take effect upon its approval by the Governor.

Approved the 19 day of May, 1947.

84 2, 3, 5, 7, 8, 9, 14, 15

SUPREME COURT OF THE UNITED STATES

No. 415.—October Term, 1947.

Earle J. Toomer, et al., Appellants, v. J. M. Witsell, et al.	Appeal from the United States District Court for the Eastern District of South Carolina.

[June 7, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

This is a suit to enjoin as unconstitutional the enforcement of several South Carolina statutes governing commercial shrimp fishing in the three-mile maritime belt off the coast of that State. Appellants, who initiated the action, are five individual fishermen, all citizens and residents of Georgia, and a non-profit fish dealers' organization incorporated in Florida. Appellees are South Carolina officials charged with enforcement of the statutes.

The three-judge Federal District Court which was convened to hear the case [1] upheld the statutes, denied an injunction and dismissed the suit.[2] On direct appeal from that judgment [3] we noted probable jurisdiction.

The fishery which South Carolina attempts to regulate by the statutes in question is part of a larger shrimp fishery extending from North Carolina to Florida.[4] Most of the shrimp in this area are of a migratory type, swimming

[1] The court was convened pursuant to § 266 of the Judicial Code, 28 U. S. C. § 380.

[2] 73 F. Supp. 371 (1947).

[3] The appeal is authorized by § 266 of the Judicial Code, 28 U. S. C. § 380.

[4] See Johnson and Lindner, *Shrimp Industry of the South Atlantic and Gulf States* (U. S. Dept. of Commerce, Bureau of Fisheries Investigational Rep. No. 21, 1934); Annual Rep. of S. C. State Board of Fisheries (1946).